IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.1104 OF 1998.

Ramchandra Bihari Yadav,
Residing at Room No.11,
Patel Chawl, Near Parsi Agyari,
Behram Baug, Jogeshwari
(West), Bombay 400 102. .... Appellant.

Versus

The Zoroastrial Radih Society,
a society registered under the
Societies Registration Act,1860
and having its office at Noble
Chamber "B", Fourth floor,
Janmabhoomi Road, Fort,
Bombay 400 001, through its
Honorary Secretary
Mr.Nadir E. Turel. .... Respondent.

Shri R.A.Thorat for the Appellant.

None for the Respondent.

CORAM : ABHAY S.OKA, J.

DATED : 11th January 2005.

ORAL JUDGMENT.:

1. Office noting shows that the Respondent is duly served with the notice of the Appeal. None appears for the Respondent when the Appeal was called out yesterday i.e. 10th January 2005. Today also none appears for the Respondent. I have heard the learned Counsel appearing for the Appellant on the merits of the Appeal.

2. This Appeal is preferred under section 104 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the said Code") for challenging that part of the Judgment and Order dated 26th November 1996 by which the

Contempt Notice of Motion No.2425 of 1992 was made absolute in terms of prayer clauses (a)(ii) and (c). The Appellant was directed to be detained in the Civil Prison for a period of two months.

3. The Appellant is the Defendant in S.C.Suit No. 1379 of 1991. On 28th February 1992 on Notice of Motion for Injunction taken out by the Respondent/Plaintiff, the learned trial Judge granted ad-interim injunction in terms of prayer clause (a), which reads thus:

> "That pending the hearing and final disposal of the suit the Defendant by himself or through his servants and agents be restrained by an order and injunction of this Hon'ble Court from carrying on any further construction work and/or inducting any person/persons in the illegal chawl at Survey No.42, Hissa No.1, village Oshiwara, Behram Baug, Jogeshwari (West), Bombay 400 012."

The case of the Respondent is that by Advocate's letter dated 28th February 1992 the Appellant was informed about the order of injunction. The case made out in the Contempt Motion is that inspite of the knowledge of the order, the Appellant illegally completed the construction of the first floor thereby committing

disobedience of the order of ad-interim injunction. Affidavit-in-reply was filed by the Appellant. In the said affidavit-in-reply contentions raised are two fold. Firstly it is contended that the order of ad-interim injunction was served on the Appellant only on 4th March 1992 when the papers and proceedings of the suit were served on the Appellant. Secondly a contention was raised that the suit structure with upper floor thereon is in existence since prior to the filing of the above suit. A rejoinder was filed on behalf of the Respondents. In the rejoinder the Respondent reiterated that on 28th February 1992 itself the Appellant was informed about the order of injunction.

4. The learned trial Judge by the impugned order disposed of the Notice of Motion No.1199 of 1992 for interim relief taken out by the Respondent as well as the Contempt Notice of Motion. The learned trial Judge held that the Appellant was guilty of disobedience of the order of ad-interim injunction and therefore, he proceeded to pass an order of detention of the Appellant in Civil Prison and removal of the structure which was allegedly erected in violation of the order of ad-interim injunction.

5. Shri Thorat, the learned Counsel appearing for the Appellant, submitted that there are no clear findings recorded by the learned trial Judge holding that the

order of injunction was served on the Appellant on a particular day and that after the service of the order the construction of the upper floor was carried out by the Appellant. He submitted that the proceedings of the Contempt Notice of Motion was in the nature of quasi criminal proceedings and unless it was strictly established that there was a wilful breach or disobedience of the order of temporary injunction, no action under Order XXXIX Rule 2A of the Code was called for.

6. I have considered the submission of the learned Counsel for the Appellant. There is nothing on record to show that the learned trial Judge granted opportunity to the parties to lead oral evidence in so far as the Contempt Notice of Motion is concerned. Considering the nature of the proceedings under Order XXXIX Rule 2A of the Code it was necessary for the learned trial Judge to give an opportunity to both the parties to lead oral evidence. In paragraph 18 of the impugned order the learned trial Judge has observed that in the affidavit dated 5th July 1993 filed by the Appellant there was not even a whisper about the contention that the construction was completed before the order was passed by the Court on 28th February 1992. The learned trial Judge has relied upon the photographs allegedly taken on 19th February 1992. The learned trial Judge has referred to the subsequent photographs and has came to

the conclusion that further construction was carried out by the Appellant after the order of ad-interim injunction was passed. It is to be noted here that in paragraph 4 of the affidavit-in-reply filed by the Appellant to the Contempt Notice of Motion, a specific case has been made out by the Appellant by stating that:

> "I say that the said suit structure with upper floor thereon is in existence since prior to the filing of the above suit."

Thus the specific case of the Appellant was that the offending construction was in existence before filing of the above suit. The learned trial Judge proceeded on erroneous assumption that no specific contention has been raised in the affidavit-in-reply that the construction was completed before the ad-interim order of injunction was passed. As a matter of fact the specific case of the Appellant is that the construction was in existence even prior to the filing of the suit. The said contention is not dealt with by the learned trial Judge.

7. Reliance is placed by the learned trial Judge on photographs produced by the Respondent. The said photographs are not proved in evidence in accordance with the Indian Evidence Act, 1872. On the basis of the said photographs the learned trial Judge has recorded a

finding that when the ad-interim order of injunction was passed, construction was incomplete and the construction was completed after the ad-interim order was served on the Appellant. It is to be seen here that the learned trial Judge has not specifically accepted the case of the Respondent that on the same day on which the ad-interim order of injunction was passed, the order was served on the Appellant. The learned trial Judge has recorded that the Notice of Motion was served on the Appellant on 3rd March 1992. The learned trial Judge has recorded a finding that there was not an iota of evidence before the Court to show that at that point of time the structure was completed by the Appellant. In my view, drastic action of detention and demolition of construction under Order XXXIX Rule 2A of the said Code could not have been ordered to be taken on the basis of such vague findings. Unless it was established before the learned trial Judge that the construction was carried out or completed by the Appellant after 3rd March 1992, action under Order XXXIX Rule 2A of the Code could not have been taken. Before ordering detention of the Appellant in Civil Prison, the learned trial Judge should have satisfied himself on evidence that it was a clear case of wilful disobedience of the order of ad-interim injunction passed by him.

8. In my view unless such wilful disobedience was clearly established, the Contempt Notice of Motion could

not have been allowed by the learned trial Judge. In the normal course, in such a situation, an order of remand was warranted. However, the alleged breach is committed in the year 1992 i.e. about 12 years back and therefore, it will be unjust now in the year 2005 to direct the Appellant to face a Contempt Notice of Motion. I must make it very clear that I am not expressing any opinion on the merits of the controversy involved in the suit. Even though the order passed on Contempt Notice of Motion is set aside, if at the time of trial or at subsequent stage the learned trial Judge finds that the construction was carried out by the Appellant during the operation of the order of ad-interim injunction, the learned trial Judge will be free to pass appropriate order.

9. Hence I pass the following order:

(i) The impugned Judgment and Order dated 26th November 1996 is quashed and set aside only to the extent to which the Contempt Notice of Motion no.2425 of 1992 is made absolute. The Contempt Notice of Motion No.2425 of 1992 stands dismissed with no order as to costs.

(ii) It is made clear that all contentions on merits are kept open. If on evidence,

the learned trial Judge finds that the Appellant has carried out any construction after he became aware about the order of ad-interim injunction, the learned trial Judge will be free to pass appropriate order in that behalf.

(iii) Subject to what is stated above, the Appeal from Order is allowed.

(iv) There will be no order as to costs.

(v) Parties to act on an authenticated copy of the order.

Judge.